IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
APPEAL FROM ORDER NO.1320 OF 1993

Sadu Babaji Kaneri Appellant

Vs.

Anant Tukaram Karshingkar & ors. Respondents

Ms.Shakuntala A. Mudbidri for appellant.

Mr.P.B.Sawant and Mr.M.V.Shinde for respondent nos.1 to 16.

Respondent no.17 is served.

CORAM: B.H.MARLAPALLE,J.

June 06, 2005.

ORAL ORDER:

1. The appellant has filed Civil Suit No.2 of 1985 originally for the relief of declaration of ownership and perpetual injunction against defendant nos.1 to 17 from interfering in his peaceful possession and cultivation of the suit land bearing Hissa No.3 of Survey No.128 admeasuring 8.3 and 24.5 Hectares situated at Karahingewadi under village Rupale in Rajapur Taluka of Ratnagiri district. By an application at Exh.58 the relief of declaration of ownership of the suit property was given up and, therefore, the suit continued for the relief of perpetual injunction against defendant nos.1 to 17. Defendant no.18 has been subsequently added as a joint owner along with the plaintiff of the suit land. The suit was dismissed by the learned Civil Judge Junior Division at Rajapur on 29/6/1991. The said decision was challenged in Civil Appeal No.61 of 1991 and the learned District Judge

at Ratnagiri was pleased to allow the appeal by his judgment dated 31/7/1993. The judgment and decree of the trial Court in Regular Civil Suit No.2 of 1985 was quashed and set aside and the suit was remanded to the trial court for fresh decision after framing and referring the following issue to the Tenancy Court:

> "Do defendants prove that they were co-tenants or joint tenants along with plaintiff and the defendant no.18 in the suit land?"

This decision of the learned District Judge is the subject matter of challenge in this appeal.

2. Ms.Mudbidri, learned counsel for the appellant-plaintiff submitted that the order passed under Section 32-G of the Bombay Tenancy and Agricultural Lands Act, 1948 (for short "the Tenancy Act") was placed on record at Exhibit 50 and once the status of the appellant along with defendant no.18 was decided by the competent Tenancy Court the lower Appellate Court could not have reopened the said issue in view of the law laid down by this Court in the case of Vithoba Ram Randiv v. Dhairyasinghrao Bhayasaheb Ghatge reported in **73 BLR 752**. The learned counsel also relied upon another decision of this Court in the case of M/s.Nilesh Construction Co. v. Gangubai reported in **AIR 1982 BOMBAY 491**.

3. It is pertinent to note that the issue framed by

the impugned order as directed to be referred to the Tenancy Court does not doubt the status of the plaintiff along with defendant no.18 as the protected tenant having obtained certificate under Section 32-G of the Bombay Tenancy Act. The defendant nos.1 to 17 had claimed that they were the joint tenants in the suit land along with plaintiff and defendant no.18 and, therefore, it was for them to prove their status as co-tenants or joint tenants. The burden of proving the said issue has been entirely cast on the defendants and the status of the plaintiff along with defendant no.18 is not reopened or is not required to be reconsidered by the Tenancy Court. If the proceedings initiated under Section 32-G were between all the present parties i.e. defendant nos.1 to 17 as well along with plaintiff and defendant no.18, the law laid down by this Court in the case of Vithoba (Supra) would be applicable. The order at Exhibit 50 does not show that it dealt with the status of defendant nos.1 to 17 as well and it appears that they were never parties before the Tahsildar in the proceedings from which the said order culminated. The reliance of the learned counsel on the decision of this Court in the case of M/s.Nilesh Construction Co. (Supra) is also misplaced. The defendants in the instant case have clearly come out with contention that they were co-tenants or joint tenants on the suit land along with plaintiff and defendant no.18 and, therefore, the suit is required to be decided by the competent Tribunal and the onus to prove the said issue as framed by the lower appellate Court entirely rests on the defendant nos.1 to 17.

4. In the premises the challenge to the impugned order is devoid of merits and, therefore, this appeal must fail. The appeal is hereby dismissed. Interim order, if any, stands vacated. No costs.

(B.H.MARLAPALLE,J.)